

(b) The meaning of the word "compensable" is the same, for purposes of the statute, whether a contract or a custom or practice is involved.⁷⁷

(c) The phrase, "custom or practice," is one which, in common meaning, is rather broad in scope. The meaning of these words as used in the Portal Act is not stated in the statute; it must be ascertained from their context and from other available evidence of the Congressional intent, with such aid as may be had from the many judicial decisions interpreting the words "custom" and "practice" as used in other connections. Although the legislative history casts little light on the precise limits of these terms, it is believed that the Congressional reference to contract, custom or practice was a deliberate use of non-technical words which are commonly understood and broad enough to cover every normal situation under which an employee works or an employer for compensation.⁷⁸ Accordingly, "custom" and "practice," as used in section 4(b) of the Portal Act, may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only "to protect every collective bargaining agreement about these activities" but "to protect the agreement between one workman and his employer" and "every practice or custom which we assume must have entered into the minds of the people when they made the contract."⁷⁹

(d) The words, "custom or practice," as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase "in effect * * * at the establish-

ment or other place where such employee was employed." The compensability of an activity under custom or practice, for purposes of this Act, is tested by the custom or the practice at the "particular place of business," "plant," "mine," "factory," "forest," etc.⁸⁰

(e) "The custom or practice" by which compensability of an activity is tested under the statute is one "covering such activity." Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant to the plant gate. It is enough, however, if there is a custom or practice covering "such activity"; there is no provision, as there is with regard to contracts, that the custom or practice be one "between such employee, his agent, or collective-bargaining representative, and his employer."⁸¹

(f) Another qualification of the "custom or practice" referred to in the statute is that it be "not inconsistent with a written or non-written contract" of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.⁸² However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.⁸³

§ 790.11 Contract, custom or practice in effect "at the time of such activity."

The "contract," "custom" or "practice" on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect "at the time of such activity." Thus, the

⁷⁷ See § 790.9(b).

⁷⁸ See colloquy between Senators Donnell and Tydings, 93 Cong. Rec. 2125, 2126; colloquy between Senators Donnell, Lodge, and Hawkes, 93 Cong. Rec. 2178, 2179; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2181, 2182. Statements of Senator Cooper, 93 Cong. Rec. 2293.

⁷⁹ Statements of Representative Gwynne, 93 Cong. Rec. 1566.

⁸⁰ Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

⁸¹ See § 790.9(d).

⁸² Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

⁸³ Senate Report, pp. 45, 49.

compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

§ 790.12 “Portion of the day.”

A “preliminary” or “postliminary” activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section “only when it is engaged in during the portion of the day with respect to which it is so made compensable.”⁸⁴ This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;⁸⁵ the provision is applicable only to walking, riding, traveling or other “preliminary” or “postliminary” activities of the kind described in section 4(a) of the Portal Act,⁸⁶ which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee.⁸⁷

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

§ 790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to com-

ply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that “the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation” or “any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged.” In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the “Administrator of the Wage and Hour Division of the Department of Labor,” and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing.⁸⁸ But where the acts or omissions complained of occurred before May 14, 1947, the employer may show that they were in good faith in conformity with and in reliance on “any” (written or nonwritten) administrative regulation, order, ruling, or interpretation of “any agency of the United States,” or any administrative practice or enforcement policy of “any such agency” with respect to the class of employers to which he belonged.⁸⁹ In all cases, however, the act or omission complained of must be both “in conformity with”⁹⁰ and “in reliance on”⁹¹ the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be

⁸⁴ Section 4(c) of the Portal Act (set out in full in § 790.3).

⁸⁵ See §§ 790.4-790.6.

⁸⁶ Conference Report, pp. 12, 13.

⁸⁷ See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

⁸⁸ Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389. See also §§ 790.17 and 790.19.

⁸⁹ Portal Act, sec. 10; Conference Report, p. 16; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, 93 Cong. Rec. 4388, 4389. See also § 790.19.

⁹⁰ See § 790.14.

⁹¹ See § 790.16.